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No. 435

Supreme Court of the United States

OCTOBER TERM 1940

CONTINENTAL CASUALTY COMPANY,
Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION OF THE CONTINENTAL CASUALTY CO. FOR A REHEARING.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Continental Casualty Company respectfully asks a rehearing of this cause for the following reasons:

1.

Petitioner is mindful that the Court having read the Transcript of Record, the opinion of the Honorable United States Circuit Court of Appeals, the petition for Writ of Certiorari and briefs is fully aware that the case was submitted, jury being waived, on a Stipulation of Facts, and there was no room for finding of fact by the Court, but only questions of law, but in the absence

of any *per curiam* denying the Writ petitioner is in the dark as to just wherein it failed to substantiate its right to the relief asked.

2.

Petitioner represents that, with the indulgence of the Court, without reiteration of argument, and in short, succinct statements petitioner will endeavor to give its reasons for asking for a rehearing.

3.

We respectfully urge that this case should not be considered as one where the statutory surety of a government contractor, ill-advisedly and wrongfully declines to live up to its obligation to the United States, because it agreed in writing to complete the defaulted contract, at the request in writing of Col. J. N. Hodges, administrative officer and *pro hac* vice of the United States, under special authority of the contract with Grasser Contracting Company, "Article 9—Delays—Damages."; and furthermore acquitted and discharged its full liability to unpaid material furnishers and laborers to the extent of $37,470.61 (Rec. pp. 43-46).

4.

Petitioner believes and respectfully suggests that this case, on the contrary, should be controlled by the principles announced by this High Court in *U. S. vs. Purcell Env. Co.*, 249 U. S. 313, saying that "the government should be animated by a justice as anxious to secure the rights of bidders for its contract as to insist upon its own"; and *Perry vs. United States*, 79 L. Ed. 919; "When the United States with constitutional authority makes contracts, it has rights and incurs responsibilities similar

to those of individuals who are parties to such instruments (*U. S. vs. Bank of Metropolis*, 15 Pet. 377, 10 L. Ed. 774.

5.

Petitioner respectfully believes that the Court does not disagree with petitioner in the following particulars, disclosed by the contract and letters of Lt. Col. J. N. Hodges under Art. IX of Grasser contract to-wit:

(a) That Col. J. N. Hodges was the signatory for the United States for the Grasser contract; (b) that upon Bankruptcy and default of Grasser Company, he was authorized and empowered under Art. IX to "terminate the right of Grasser Company to proceed with the work."; (c) that he had the authority to avail for the Government of its options: either to complete the work by taking possession of the equipment; or to sub-contract the work; or do what he did, agree with the Surety, Continental Casualty Co. to take over and complete the work "according to the terms of the Grasser contract", to-wit at 8 cents per cubic yard of earth handled, payments to be made by the United States in monthly progress payments.

6.

Petitioner does not know how much the Court was affected by the erroneous statement of the Court of Appeals that petitioner relied on or based its declaration that it accepted the offer of the United States to the Surety March 17, 1934 to complete the work according to the terms of the Grasser contract by its telegram and letter of March 22, 1934, the Court of Appeals ignoring the fact that the misunderstanding shown therein was corrected by Lt. Col. J. N. Hodges' letter of March 26th, 1934, for the first time advising the Surety that he had only ter-

minated the right of Grasser to proceed and that it was his opinion "this was the only action necessary in the premises", which was immediately accepted and acquiesced in by the Surety by its reply of March 28, 1934; the Court of Appeals ignoring the fact also that by letter of March 31, 1934 to Receiver Landry (Rec. 66) and by letter to Milner, April 3rd, 1934, Lt. Col. J. N. Hodges admitted the Surety had agreed to complete the work, thus making a mutual understanding and contract.

7.

Petitioner respectfully shows that it must assume this High Court must have found that this was a binding legal contract with the United States.

8.

Petitioner does not know how much the Court was affected by the mis-statement of fact in the solicitor general's brief, page 9; saying: "While petitioner might have reduced the costs if it had completed the contract, it elected not to go forward under the agreement". The Solicitor General ignored the stipulated fact that it was on April 3, 1934 (Rec. 68-69) that Lt. Col. J. N. Hodges formally advised Surety's attorney that no monthly progress payments (Note—Stipulated in Article XVI of Grasser contract) would be made and that the Surety thereupon on April 6, 1934 (Rec. 69-70-71) declined to go ahead only after it was advised no monthly progress payments would be made. Again petitioner calls the Court's attention to another serious mis-statement in note bottom at page 9 of his brief, viz.: "Moreover there is no evidence to show that petitioner could not have made the same arrangements on **April 24, 1934 when it received the offer for a supplement contract** (R. 228-229). His

statement and citation is erroneous. The indisputable evidence is that the American Bank & Trust Co. secured release of its dredges in the Bankrupt Court on April 24—and the telegram from Lt. Col. J. N. Hodges is dated April 28, 11:59 A. M. (not April 24, 1934) suggesting supplemental agreement at the request of Chief of Engineers (Rec. 72); but the supplemental suggested agreement was not received by Milner until **May 10, 1934** (Milner's testimony, Rec. 220). (Stipulation of fact (Rec. 55).

9.

The Court of Appeals said: "When the contractor defaulted in the performance of the contract by filing the petition in bankruptcy, the rights of the government and the liabilities of the Surety under the contract immediately became fixed". Petitioner respectfully shows that the statement is an abstract statement and *absque injuria*, **unless** the government availed itself of its option (a) to take over the equipment itself and complete the work (Art. 9 Delays—Damages) (Court of Appeal opinion foot note page 3) or (b) contracted the work and translated this abstract principle into actual damages, in which case the Surety would have been bound. But the government waived its options and Lt. Col. J. N. Hodges contracted with the Surety to complete the work at 8 cents a cubic yard with monthly progress payments.

10.

Petitioner respectfully shows that when the Court of Appeals committed reversible error by holding that (pages 4 and 5 of opinion) conceding a valid contract existed, the government was not bound by the "repudiation" of the contract. Petitioner urges, with respect, as established by the Circuit Court of Appeals, Fifth Cir-

cuit, that this holding is contradictory of the Court of Appeals' own decision in *Hale County, Texas vs. American Indemnity Co.*, 63 Fed. (2d) which announced the settled principle, which we do not controvert, that the government is not bound by the laches or negligence of its officers. The Court of Appeals announces this principle in the *Hale County* case and then cites 6 or 7 cases showing what particular negligence or laches that **does not** bind the government—but the act of Lt. Col. J. N. Hodges was by no stretch of imagination either **laches** or **negligence.**

11.

Petitioner respectfully submits that whatever actuated Lt. Col. J. N. Hodges in repudiating his own contract is *dehors* the issues in this case, the factual stipulation and evidence being that Col. J. N. Hodges, after getting the Surety's consent to complete the work, repudiated his valid, legal, binding contract.

12.

Petitioner respectfully shows that whatever action Lt. Col. J. N. Hodges, vested with full authority, took under Art. IX of the contract to-wit: terminating the right of the contractor to proceed; waiving the 2 options of the government and making the agreement with the surety were valid and binding agreements of the United States under the decisions of this High Court quoted, and the government could not repudiate this agreement and go back and advertise the contract under an option legally waived and re-let the contract to Cranlan, Inc., at an excess cost of $28,000 (our reply brief, p. 10) and charge the Surety with this excess cost which it could only do if it had availed itself of its option.

13.

Petitioner calls attention to just one more point heretofore unstated. The supplemental agreement offered April 28, 1934 (not April 24, as stated by Solicitor General in brief) was not received until May 10, 1934 and contained (Rec. 96) the extraordinary clause:

> "Whereas from the time of beginning of operations the contractor failed to make necessary rate progress to assure completion of the work within the contract time".

We respectfully submit that had the Chief Engineer between April 3, 1934 and April 24, 1934 offered to pay progress payments, petitioner would have gone on with the work and the United States would not have suffered one dime of damages or excess cost.

14.

We respectfully urge that the government cannot charge the continental Casualty Co. with the $28,963.72 excess cost of Cranlan, Inc., doing the work—and if this is true the Continental Casualty Co. does not owe the government one dime because the government concedes its liability to the Surety for percentages retained and amounts due at time of default for $21,268.89 (see statement, page 10, our reply brief).

Petitioner shows that the foregoing remarks pretermit any discussion of the Surety's liability for the Government area and District overhead of $14,399.87, which the testimony clearly shows is a paper or bookkeeping arbitrary percentage charged against District work all over the United States, to ascertain what Government work is costing the Government, and as the

Government witness testifies, is never charged against the job unless the Government completes the work.

The stipulation of fact stipulates that the right to charge these items is submitted as a conclusion of law, without question of the accuracy of the figures.

We respectfully submit this petition for a rehearing.

PURNELL M. MILNER,
Attorney for Continental Casualty Co.

Nov. 25, 1940.

CERTIFICATE

I certify I have by registered mail sent 5 copies of this petition to the Solicitor General at Washington, D. C.

PURNELL M. MILNER.